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CHARLES ELMORE

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In the Supreme Court of the United States

OCTOBER TERM, 1928

INTERNATIONAL SHOE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

U.S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 718

INTERNATIONAL SHOE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Circuit Court of Appeals (R. 725) is reported in 29 F. (2d) 518.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 27, 1928. (R. 735.) The petition for certiorari was filed February 25, 1929.

The jurisdiction of this Court to issue a writ of certiorari is found in Section 11, paragraphs 3 and 4 of the Clayton Act (c. 323, 38 Stat. 730, 735; U. S.

C. Title 15, Sec. 21) and in Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Only two questions of law seem to be presented by the petitioner. The first is whether the complaint served by the Federal Trade Commission upon the petitioner, accusing it of having illegally acquired the stock of W. H. McElwain Company, was sufficient under Section 7 of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, 731). The second is whether, the petitioner having, after the filing of the complaint but before the Federal Trade Commission's final order, by virtue of its stock control of the W. H. McElwain Company, caused the assets of that company to be transferred to itself, the Federal Trade Commission had power to order it to divest itself of such assets. Other questions sought to be raised by the petitioner are mere questions of fact which have been decided adversely to the petitioner by the Federal Trade Commission, and the Circuit Court of Appeals has held that such adverse decisions were supported by the evidence.

STATUTE INVOLVED

The relevant portion of Section 7 of the Clayton Act is as follows:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share

capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

STATEMENT

The International Shoe Company was in 1921 the largest manufacturer of shoes in the United States. (R. 43, 209, 306.) It manufactured and sold a general line of shoes, including shoes for men, boys, women, misses, and children, and including a line of dress shoes for men, boys, women, and misses. (R. 40, 162, 164, 165, 283, 329.) On May 11, 1921, it acquired practically all of stock or share capital of W. H. McElwain Company (R. 46; Resp. Ex. 4, p. 616), the largest shoe manufacturer in New England and one of the four largest shoe manufacturers in the United States (R. 59, 306, 343, 354, 367; Com. Ex. 2; Resp. Ex. 26, p. 647). The W. H. McElwain Company manufactured dress shoes for men, boys, and misses. (R. 25, 283.)

The International Shoe Company distributed its shoes generally throughout the United States, selling almost exclusively to retailers. In the year from June 1, 1920, to May 31, 1921, it sold generally throughout the United States 754,835 pairs of dress shoes for men of its Patriot brand, for approximately two and one-half million dollars. (R.

171, 172, 450.) These shoes of the International Shoe Company consisted of thirty-two styles which were similar in style, comparable in price, and equal or superior in quality to the men's dress shoes produced by the W. H. McElwain Company. (R. 170, 175, 222, 431–4; Com. Ex. 13.) By dress shoes are meant shoes worn generally as distinguished from work shoes. (R. 44, 180, 220.) Many of the retailers in the largest cities throughout the country did not buy from the International Shoe Company because it refused to put the name of the individual retailer on the shoes.

W. H. McElwain Company did not manufacture a general line of shoes, but was the largest manufacturer of men's dress shoes in the United States. (Com. Ex. 2.) It sold its shoes direct to retailers, jobbers, and wholesalers throughout the United States (R. 118, 215, 216, 217; Resp. Ex. 24, pp. 642, 643), and sold its shoes also from branch houses operated under different names located in Boston, Masachusetts; New York City, N. Y.; Columbus, Ohio; Kansas City, Missouri; Chicago, Illinois; and San Francisco, California (R. 44, 215). Its sales direct to retailers were made chiefly to retailers in the larger cities, but it also sold direct to retailers in many of the smaller towns throughout a large part of the country. For the fiscal year ending May 31, 1921, it sold direct to retailers in eighty-eight towns of less than ten thousand inhabitants in eighteen States (Resp. Ex. 47), but the far greater proportion of its sales was made through its branch

houses and independent jobbers and wholesalers scattered generally throughout the United States (Resp. Ex. 24, 29, 37). The W. H. McElwain Company put the name of the retailer upon the shoes sold to the retailer when the retailer requested it.

Immediately after it acquired the stock of the W. H. McElwain Company on May 11, 1921, the International Shoe Company assumed control and direction of the W. H. McElwain Company and all competition between the two companies ceased. (R. 44, 224, 306, 416.) The International Shoe Company sold two of the branch houses of the W. H. McElwain Company and closed three others and stopped its policy of selling to independent wholesalers and jobbers and brought it in line with the International Shoe Company's policy of selling almost exclusively direct to retailers. (R. 47, 51, 81, 105.)

On May 18, 1923, the Federal Trade Commission issued a complaint against the International Shoe Company, Paragraph Three of which charged as follows (R. 31):

> On or about May 11, 1921, while the International Shoe Company and the W. H. McElwain Company were engaged in commerce in competition with each other as aforesaid, the International Shoe Company acquired the whole, or substantially all, of the stock or other share capital of said W. H. McElwain Company, and still owns and controls such stock or share capital so acquired. Such acquisition of such stock or share capi-

tal of the W. H. McElwain Company was contrary to law and violative of said Act of Congress approved October 15, 1914 (the Clayton Act), and especially Section 7 thereof. The effect of the acquisition by the respondent of such stock or other share capital of the W. H. McElwain Company was, to wit:

(a) To substantially lessen competition tween the W. H. McElwain Company, the corporation whose stock was so acquired, and the International Shoe Company, the corporation making the acquisition;

(b) To restrain commerce in the shoe business in the several sections and communities of the United States in which the respondent and the said W. H. McElwain were engaged in business in interstate commerce, as aforesaid;

(c) To tend to create in the respondent a monopoly in interstate commerce in the shoe business.

After the issuance and service upon petitioner of the complaint and before the petitioner filed its answer it put the stock of the W. H. McElwain Company which it held into the hands of dummies who passed the requisite votes and signed the necessary papers to transfer to the petitioner the property and assets of the said McElwain Company. Great effort was made by the petitioner to conceal the real nature of this transaction and to make it appear as an unsolicited offer by the dummies to buy the stock from petitioner and a bona fide and wholly disconnected purchase by the petitioner of

the property and assets of the company, after the sale of the stock. (R. 61–71, 103, 104, 121–125, 189, 228–279, 315, 317, 320–322, 371–373, 376, 403–407, 463–466; Com. Ex. 8, Resp. Ex. 41–44.) This transaction is completely set out in the findings of fact. (R. 514–522.) The petitioner, on June 5, 1922, filed with the Commission its answer containing, among others, the following averments:

> Fourth: And further answering the respondent would respectfully show this commission that upon receipt of the complaint, and upon being advised that there was a possible technical violation of Section 7 of the Clayton Act, in its acquisition and ownership of the share capital of W. H. McElwain Company, this respondent took the necessary steps to remedy such technical violation; that it has divested itself of any and all stock or share capital of W. H. McElwain Company; and that no officer, director or stockholder of respondent owns or controls any stock or share capital of said W. H. McElwain Company. Therefore, the premises considered, this respondent respectfully asks that the complaint be dismissed.

On November 25, 1925, the Commission issued its order directing the International Shoe Company to divest itself of the stock and share capital of the W. H. McElwain Company and of the properties and assets of said company acquired as a result of its acquisition of the stock of said company. (R. 499, 524–525.) The effective date of the order be-

came May 7, 1927, because of extensions granted by the Commission at the request of the petitioner. (R. 528–541.)

ARGUMENT

I

The complaint of the Federal Trade Commission was sufficient

Paragraph Three of the complaint, set forth in full in the statement of facts, alleged that while the International Company and the McElwain Company were engaged in commerce in competition with each other the International Company acquired the whole or substantially all of the stock of the McElwain Company and still owned and controlled such stock; that such acquisition of stock was violative of the Clayton Act; and that the effect of the acquisition was to substantially lessen competition between the two companies, to restrain commerce in the shoe business in the sections and communities in which the two companies were engaged in business in interstate commerce as set forth in the preceding portions of the complaint, and to tend to create in the respondent a monopoly in interstate commerce in the shoe business. It seems clear that these allegations were sufficient to bring the case within Section 7 of the Clayton Act. The complaint in a proceeding of this kind does not require the exactitude of an indictment at common law. *Swift and Company* v. *United States*, 196 U. S. 375, 395.

In *United States* v. *United Shoe Machinery Co.*, 234 Fed. 127, 150, affirmed, 258 U. S. 451, Judge Trieber said:

> For these reasons, in the opinion of the court, all that is necessary to state a cause of action under the Clayton Act is to charge that the defendants committed the acts prohibited by the statute and that they tend to substantially lessen competition or create a monopoly in interstate commerce.

In the case at bar the complaint alleged the unlawful acquisition of stock and that it tended to substantially lessen competition, to restrain commerce and to create a monopoly. Petitioner's attack on the complaint is apparently on the ground (Pet., p. 7) that it did not allege all of the detailed evidentiary facts tending to prove the ultimate facts which were alleged.

II

The Federal Trade Commission had power to order the petitioner to divest itself of the assets of the McElwain Company acquired by it through its stock control after the Commission's complaint was served

The petitioner seems to suggest that the Federal Trade Commission has not power to compel it to divest itself of the assets of the McElwain Company. If this were so, Section 7 of the Clayton Act would become practically a dead letter, because any company when attacked by the Commission for an illegal acquisition of stock in another company

could immediately use its stock control to have the assets of the other company transferred to it. Such a transfer could easily be accomplished before the Commission could try the case and issue its order. The Commission does not have the equitable power to order a continuance of the *status quo pendente lite.* (*National Harness Manufacturers' Assn.* v. *Federal Trade Commission,* 268 Fed. 705, 707; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45, 48; *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, 312; *Eastman Kodak Co.* v. *Federal Trade Commission,* 7 Fed. (2d) 994, 996; *American Tobacco Co.* v. *Federal Trade Commission,* 9 Fed. (2d) 570, 586.)

While the majority of this court in *Thatcher Manufacturing Co.* v. *Federal Trade Commission,* 272 U. S. 554, held that the Clayton Act has no application to ownership of a competitor's property and business obtained *prior to* any action by the Commission, even though this was brought about through stock unlawfully held, it seems clear that both the majority and the minority opinions in the *Thatcher case* and the cases decided with it recognize that stock unlawfully held can not be used to acquire property *after* action by the Commission. Mr. Justice McReynolds, writing the opinion of the Court in the *Western Meat case,* said (pp. 559–560):

> The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commis-

sion's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent.

Although the respondent held all the capital stock, the plant and other property of the Nevada Packing Company had not been acquired. The Commission directed that it so divest itself of all this stock as to include in such divestment the Packing Company's plant and property necessary to the operation thereof, etc. Taken literally, this goes beyond the situation revealed by the record, but the order must be construed with regard to the existing circumstances. Divestment of the stock must be actual and complete and may not be effected, as counsel for respondent admitted was intended, by using the control resulting therefrom to secure title to the possessions of the Packing Company and then to dissolve it. Properly understood, the order was within the Commission's authority, and the court below erred in direct-

ing the elimination therefrom of the above-quoted words.

And Mr. Justice Brandeis, in dissenting from the opinion in the *Swift* and *Thatcher cases,* said (p. 563):

> The institution of a proceeding before the commission under § 7 does not operate, like an injunction, to restrain a company from acquiring the assets of the controlled corporation by means of the stock held in violation of that section. If, in spite of the commencement of such a proceeding, the company took a transfer of the assets, the Commission could, I assume, require a retransfer of the assets, so as to render effective the order of divestiture of the stock.

In *Federal Trade Commission* v. *Eastman Company,* 274 U. S. 619, the Court merely followed the *Thatcher case.* Mr. Justice Stone in his dissenting opinion, referring to that case, said (p. 626):

> It was not held that the Commission under no circumstances could compel the sale of physical property, and there was in fact a clear intimation in the opinion that under § 7 of the Clayton Act the acquisition of the property after a complaint had been filed against the corporation for illegal stock purchases would not find the Commission powerless.

There is nothing in the majority opinion which is inconsistent with this statement.

The petitioner complains of the practical difficulties which it will encounter in any attempt to divest itself of the assets of the McElwain Company. While there may be some such difficulties, there is no doubt that a satisfactory plan for the divestiture can be devised. If the petitioner suffers somewhat from its action in acquiring the assets of the McElwain Company, it has only itself to blame, for it accomplished such acquisition after it had received the complaint of the Federal Trade Commission.

III

Other questions sought to be raised by the petitioner are mere questions of fact which do not warrant review by this Court

The greater portion of the petition and the brief in support thereof is devoted to argument upon questions of fact which have been decided adversely to the petitioner by the Federal Trade Commission. The Circuit Court of Appeals has held that such adverse decisions were supported by the evidence, and of course if this is true the findings are, under Section 11 of the Clayton Act, conclusive. The Circuit Court of Appeals said (R. 727–728):

> It is not seriously contended that any of the findings of fact of the Commission are unsupported by the testimony. Petitioner merely seeks to induce this Court to hold the Commission wrong in its inferences from the

> facts, and on that ground alone to reverse the order.
>
> Nevertheless, we have carefully examined the record and the petitioner's two briefs, with the result that we find that the inferences of the Commission are not only reasonably drawn from undisputed facts, but that no other inferences could, reasonably, be so drawn.

Under these circumstances it seems clear that none of the petitioner's contentions as to the facts presents any question warranting review of the case by this Court, and no extended analysis of the evidence supporting the Commission's findings seems necessary. It may be of assistance to the Court, however, if we discuss briefly the petitioner's various contentions.

(1) *The petitioner's contention that there was no substantial competition between the two corporations at the date of the acquisition of the stock.*

In the first place the existence of substantial competition is not required by Section 7 of the Clayton Act. The requirement is that—

> * * * the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition * * *.

That this was the effect of the acquisition by the International Company of the stock of the McElwain Company is specifically found in Paragraph Twenty-Three of the Commission's findings. (R.

512.) The Commission also found, however, that there was substantial competition between the two corporations at the time of the acquisition of the stock. (R. 502.)

Paragraphs Five and Six containing this finding were quoted in the opinion of the Circuit Court of Appeals which said (R. 730):

> The findings in these paragraphs are fully supported by the testimony and are therefore conclusive on this Court.

The facts set forth in the statement in this brief fully support the findings of the Commission and no further or more detailed analysis of the testimony seems necessary.

(2) *The petitioner's contention that the acquisition of the stock of the McElwain Company did not lessen competition because the McElwain Company was insolvent and could no longer have competed.*

Of this contention the Circuit Court of Appeals (R. 731) said:

> While the McElwain Company had suffered substantial losses in the tremendous slump in prices of 1920–21, there is no foundation whatever for the petitioner's contention that (except for this purchase) the concern would have gone out of existence and therefore out of competition with the petitioner. On the contrary, there were several alternatives—all reasonable and inconsistent with the petitioner's theory that the McElwain Company's losses suffered and conse-

quent shortage of working capital, would (except for the merger with petitioner) have put it out of the shoe-producing business. Some of these alternatives are:

(a) The McElwain Company's bank creditors might have carried the concern, just as at that time the banks were carrying a very large percentage of the business concerns of this community. It was a period of "frozen credits," a time when there was practically a conceded moratorium to a large share of our business concerns, which competed fiercely for rehabilitating trade.

(b) If a receivership had been found a necessary expedient, competition under receivership management would have been likely to be intensified, not eliminated.

(c) In case of actual bankruptcy, the holders of the preferred stock (one or both classes) would in their own interest have taken over the property, kept it in active operation and therefore in competition.

To hold, as petitioner's counsel ask this court to hold, that the Commission was bound to draw the inference that the McElwain Company's financial condition was such that it would have ceased to be a competitor of the International in the shoe business, would be for the court, *ultra vires,* to substitute a highly speculative prophecy for the Commission's fair and soundly grounded contrary inference.

Since the Federal Trade Commission found that the effect of the acquisition of the stock of the

McElwain Company was to substantially lessen competition (R. 512), it must have found that the McElwain Company was capable of competing. The only specific findings as to the financial condition of the McElwain Company, however, are those contained in paragraph twenty-four of the Findings (R. 512–513), which are to the effect that at various dates shortly before and shortly after the acquisition of the stock of the McElwain Company by the International Company the value of the assets of the McElwain Company was in excess of its indebtedness. The International Company after an examination of the books paid $9,463,590.20 for the stock of the McElwain Company (R. 127, 195, Resp. Ex. 2), which is persuasive evidence that the International Company thought that the net value of the McElwain Company over and above its indebtedness amounted to that much. Moreover, the record shows that the McElwain Company's credit had not been restricted (Com. Ex. 1, R. pp. 357, 369); that the McElwain Company had never defaulted in dividends on its first preferred or its second preferred stock (Com. Ex. 1, Resp. Ex. 30, R. p. 324). The record fails to show that any creditor was crowding it for payment or that it was not paying its bills in the regular course of business as they became due. The McElwain Company's cash on hand, receivables, and merchandise, at the then market values, exceeded its total current liabilities by more than $3,200,000 at the time its stock was

purchased by petitioner. (Resp. Ex. 1.) The record clearly shows that the McElwain Company's properties have been operated at a profit since petitioner acquired its stock. (R. pp. 197, 275, Resp. Ex. 26, Ex. A, p. 553, Ex. A, p. 559).

It may be admitted that the McElwain Company was, as petitioner contends, in financial difficulties. It may also be admitted that, as the petitioner contends, a concern may have assets of greater value than its liabilities and still be unable to continue in business. But in the present case it is absolutely inconceivable that the McElwain Company would have been compelled to cease business altogether if its stock had not been purchased by the International Company. Drastic steps might have been necessary in order to take care of its indebtedness; both stockholders and creditors might have had to make sacrifices to carry the company through the period of depression existing in 1921; yet it seems perfectly certain that this concern for whose stock the International Company was willing to pay over nine million dollars would have continued in business in some manner or other if the International Company had not purchased the stock.

(3) *The petitioner's contention that the original transaction by which the International Company obtained control of the McElwain Company, though in form a stock purchase, was in substance a purchase of assets, and therefore not a violation of the Clayton Act.*

Even if the transaction had been in substance a purchase of assets, it may be doubted whether the International Company, having chosen to give it the form of a purchase of stock, could escape the ban of the Clayton Act. But it is perfectly clear that the transaction was the same in substance as in form—a purchase of stock and not a purchase of assets.

The Circuit Court of Appeals said (R. 733–734):

> Another groundless contention of the petitioner is "that, in substance and reality, the purchase was one of assets and business." It was not. The petitioner refused to have anything to do with the merger on the basis of purchasing assets and business; it not only insisted upon the purchase of the stocks, but insisted that the purchase price, nearly $9,500,000, should be so divided among the three classes of stocks as to require a sacrifice of 17½% (about $1,220,000) from par by the holders of the first preferred (the investing public); and 25% (about $650,000) by the second preferred, in order that the holders of the common stock—which had been wiped out by the losses—might obtain 50%. The common stock then had the voting power and was held mostly by the executive forces; the purchaser wanted, for obvious business reasons, to retain the effective managerial forces of this concern in good courage and friendly attitude, when undertaking long-distance management of the McElwain Company's great business. The mo-

tives on both sides to put through a merger so advantageous to voters in the selling company are obvious.

The record shows that the International Shoe Company refused to buy the assets of the W. H. McElwain Company at any price (R. 58, 89, 292, and Com. Ex. 1), and that a price was worked out for the three classes of McElwain stock upon the basis of its net assets, after petitioner had had a careful examination of the books of the company made, which gave to the first preferred stockholders 82½% of the par value of the stock, and to the second preferred stockholders 75% of the par value of the stock, and to the common stockholders 50% of the par value of the stock (R. 92, 196; Resp. Ex. 4). The International Shoe Company paid, for all but thirty-five shares of the first preferred and fifty shares of the common stock of the W. H. McElwain Company, $9,463,590.20. (R. 127, 195; Resp. Ex. 2.) The capital liability of the W. H. McElwain Company at the time was $13,092,900.00. (Resp. Ex. 1.) The acquisition of the stock was admitted by the petitioner in its answer to the complaint. (R. 32.)

The record indicates that had the petitioner purchased the assets instead of the stock of the W. H. McElwain Company it would have had trouble with some of the stockholders, particularly the common stockholders, the officers, and directors of the company, who would have received nothing for their stock at the price paid by the International Shoe

Company. (R. 62, 65, 312, 422, 463, 464; Resp. Ex. 1.)

CONCLUSION

The case presents no substantial question of law and the petition should therefore be denied.

WILLIAM D. MITCHELL,
Attorney General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

ROBERT E. HEALY,
Chief Counsel, Federal Trade Commission.

ADRIEN F. BUSICK,
Assistant Chief Counsel.

GARDNER P. LLOYD,
Special Assistant to the Attorney General.

BALDWIN B. BANE,
Special Attorney.

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